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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-409

ALFORD COLLINS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

, OCTOBER TERM, 1971

No. .....

ALFORD COLLINS,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on July 12, 1971.

The opinion of the Court of Appeals is not yet reported and the slip opinion is appended as Exhibit A. A petition for rehearing was timely filed but denied on August 24, 1971. The Court's order denying the same is appended as Exhibit B.

The jurisdiction of this court is invoked under 28 U.S.C. Section 1254 (1) and Rule 19 (1).

QUESTIONS PRESENTED

I

Does the *Ehlert* decision purport to control the cases of conscientious objectors who, because of their religious beliefs, cannot conscientiously submit to induction into the military?

II

Does the due process and equal protection requirement of the Fifth Amendment permit the denial of a forum in which a citizen's post-induction-order conscientious objector claim can be decided?

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution is set forth as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

After being found physically acceptable for induction, Petitioner was classified I-A on January 15, 1967. An order to report for induction was issued May 12, 1967, with a reporting date of May 23, 1967.

Subsequent to the issuance of the induction order, Petitioner's religious beliefs crystallized and he embraced conscientious objector convictions to both combatant and noncombatant military service.

On May 23, 1967, Petitioner filed the completed Special Form for Conscientious Objectors (SSS Form 150), with attachments, setting forth a prima facie claim to exemption from both combatant and noncombatant military service (Govt. Ex. No. 1, pp. 14-34). On the same day Petitioner reported for induction as ordered but refused to take the symbolic step forward.

Petitioner's local board reviewed his file on July 6, 1967, and was of the opinion that, after the order to report for induction was issued, there was no change in status due to circumstances over which he had no control. The board refused to reopen his classification.

Thereafter, an indictment was returned against Petitioner, charging him with failure to report for and submit to induction in violation of 50 U.S.C., Section 462(a). After a jury verdict of guilty on May 1, 1969, a judgment of conviction was entered on September 8, 1969. The Petitioner was sentenced to three years' imprisonment. The conviction was affirmed by the Fourth Circuit Court of Appeals on July 12, 1971.

REASONS FOR GRANTING THE WRIT

The decision in the Supreme Court case of *Ehlert* v. *U. S.*, 401 U.S. ....., 28 L.Ed.2d 625, 39 U.S.L.W. 4453, was predicated upon a set of facts in which the registrant could enter the military service and then have a post-induction-order conscientious objector claim heard.

In *Ehlert*, the Court held it to be essential that late crystallizers be provided a full and fair opportunity to pre-

sent the merits of their conscientious objector claims. 401 U.S. ——, 28 L.Ed.2d 625, 631, 39 U.S.L.W. 4453, 4455 (1971). The Court held that Selective Service may refuse to consider such late crystallizing claims *only* on the condition that the Army provide specific procedures for their consideration after induction into the military.

There are two types of classifications for conscientious objectors. These are the I-O and I-A-O classifications. The I-O classification is granted to conscientious objectors who object to both combatant and noncombatant service. 32 CFR 1622.14. The I-A-O is granted to conscientious objectors who only object to combatant service in the Arm Forces. 32 CFR 1622.11. At this point it is essential that Petitioner make clear that our following argument does not concern the I-A-O classification, but concerns itself only with the I-O classification.

There are two different types of conscientious objectors that come within the I-O classification. Both of these types object to combatant *and* noncombatant military service. However, there is at least one theological conviction separating them which results in the following distinction:

On the one hand, there are those I-O claimants who hold theological convictions that *permit them to enter* into the military for the purpose of effectuating their legal remedies. See *O'Brien* v. *Resor*, 423 F.2d 594 (4 Cir. 1970).

On the other hand, there are those whose theological convictions *prohibit them from entering* the military service under any circumstances. *Estep* v. *U. S.*, 327 U.S. 114, 130 (concurring opinion by Justice Murphy) (1946).

Thus, all late crystallizing I-O conscientious objector claimants, who can submit to military induction to have their claims adjudicated, are assured of a forum to hear their claims.

However, I-O claimants such as Petitioner and members of other major religions such as Mennonites, Friends, Brethren, etc., who are prohibited by their religious convictions from entering into the military service in any capacity, are denied any forum where their post-induction-order conscientious objector claims may be heard.

Selective Service is precluded from hearing their claims under the authority of *Ehlert*. The Army refuses to hear such claims unless they submit to induction, which men with convictions like the Petitioner cannot conscientiously do. See the letter of Mr. Bland West, Deputy General Counsel of the United States Army, in which the Army refused to hear the claim of a conscientious objector in the same situation as Petitioner. Mr. West's letter is appended as Exhibit C.

Counsel respectfully suggests that *Ehlert* may not be applied to allow one type of I-C claimant to have their claims heard by the military, while leaving those I-O claimants with religious convictions like the Petitioner without a hearing and without a remedy. To do so would be discriminatory and would violate the equal protection of the law concept, as the same is read into the due process clause of the Fifth Amendment of the United States Constitution. For analogous cases where the Fifth Amendment was construed to require equal protection of the law to prohibit an unfairness, see *Bolling* v. *Sharpe*, 347 U.S. 497 (1954); *Bolton* v. *Harris*, 395 F.2d 642 (D.C. Cir. 1968).

Further, to deny a hearing to the conscientious objector who has theological convictions that will not permit him to enter into the military would be so unjust as to violate procedural due process as encompassed in the Fifth Amendment of the U.S. Constitution.

Therefore, it can be seen that this case presents a distinguishing factual situation and a problem which was

not considered in *Ehlert*. This very problem was recognized by Justice Murphy in his concurring opinion in the landmark Selective Service case of *Estep* v. *U. S.*, 327 U.S. 114. at page 129 (1946). Because the quote is lengthy, it is set forth in an addendum as Exhibit D.

The alternatives to in-service consideration of a post-induction-order conscientious objector claim are that Selective Service reopen and consider Petitioner's claim, or that the Court itself pass upon Petitioner's claim de novo. Otherwise, Petitioner faces a felony conviction without ever having had the opportunity to have the sincerity of his religious convictions considered.

If the Court refuses to pass upon this question, then an entire segment of society will be faced with the dilemma of:

> "How can a man, who cannot conscientiously submit to induction, submit to induction, in order to prove that he cannot conscientiously submit to induction?"

CONCLUSION

For the foregoing reasons, counsel respectfully suggests, and requests, that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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EXHIBIT A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13,922

United States of America,
Appellee,

versus

Alford Collins,
Appellant.

Appeal from the United States District Court for the Northern District of West Virginia. Robert E. Maxwell, District Judge.

Argued February 2, 1970. Decided July 12, 1971.)

Before Haynsworth, Chief Judge, and Boreman and Winter, Circuit Judges.

John L. Allen and Lester C. Hess, Jr. (Bachmann, Hess, Bachmann & Garden, and Ralph K. Helge on brief) for Appellant, and Thomas M. McCullouch, Assistant United States Attorney (Paul C. Camilletti, United States Attorney, on brief) for Appellee.

Per Curiam:

The defendant was convicted of refusing induction into the armed services over his objection that he was exempt from military training and service by reason of his conscientious objection to participation in war, a belief which, he said, had crystallized after receipt of his order to report for induction.*

In *Ehlert* v. *United States*, ... U.S. ....., the Supreme Court held that under current interpretations of the applicable statutes and regulations a registrant's local board is not required to consider claims of conscientious objection alleged to have arisen after an order to report has issued. Such claims may be heard by, and must be presented to, the agencies charged with processing in-service applications for relief. The failure of the defendant's local board to reopen his classification after he was ordered to report, therefore, is unavailable as a defense to a prosecution for refusing induction.

Affirmed.

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*Several claims of procedural irregularity in the local board's issuance of the order and in the defendant's processing at the induction station are also raised. We find no substance in any of them.

EXHIBIT B

(Filed August 23, 1971)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13,922

United States of America,
Appellee,

versus

Alford Collins,
Appellant

Appeal from the United States District Court for the Northern District of West Virginia.

Upon consideration of the petition for rehearing in the above entitled case,

IT IS ORDERED that the petition for rehearing be, and the same is hereby, denied.

FOR THE COURT:

/s/ Clement F. Haynsworth, Jr.
Chief Judge, Fourth Circuit

EXHIBIT C

(Seal)

DEPARTMENT OF THE ARMY
Office of the General Counsel
Washington, D.C. 20310

23 Jul 1971

Ralph K. Helge
Attorney At Law
Suite 205
285 West Green Street
Pasadena, California 91105

Dear Mr. Helge:

Your letter to Mr. Robert Jordan III has been referred to me for reply.

In your letter, you stated that your client, Mr. Paul Joney Adams, refused to submit to induction. If he is not a member of the Army, then the provisions of AR 635-20 for filing a conscientious objector claim have no application to him. I would also point out that the *Ehlert* decision, cited in your letter, does not contemplate the Army entertaining the applications of late crystallizing conscientious objectors unless they are in the Army. I would note on this point the specific language used by Mr. Jordan cited in *Ehlert*.

> 'You also asked whether the Army allows a *soldier* to file for discharge in instances where his conscientious objector views are fixed after notice of induction but prior to entry into the military service. Present practice grants the *soldier* the opportunity

to file in such cases.' (emphasis added, 39 U.S.L.W. 4456, n. 11)

If Mr. Adams should become a member of the Army (soldier) at any time in the future, he will, of course, be eligible to file for separation because of his conscientious objector views.

Sincerely,

/s/ Bland West
Bland West
Deputy General Counsel
(Military and Civil Affairs)

EXHIBIT D

Concurring Opinion of Justice Murphy, Estep v. U.S., 327 U.S. 114, 129 (1946).

The further suggestion is made that the only judicial review of induction orders available is by means of habeas corpus proceedings brought subsequent to induction and that this remedy satisfies whatever judicial review may be required by the Constitution. I fully concur in the desirability and necessity of such a proceeding for those who have been inducted and who wish to test the validity of their induction orders.

It should be noted in passing, however, that this remedy may be quite illusory in many instances. It requires one first to enter the armed forces and drop every vestige of civil rights. Military orders become the law of life and violations are met with summary court-martial procedure. No more drastic condition precedent to judicial review has ever been framed. Many persons with religious or conscientious scruples are unable to meet such a condition.

But even if a person is inducted and a quest is made for a writ of habeas corpus, the outlook is often bleak. The proceeding must be brought in the jurisdiction in which the person is then detained by the military, which may be thousands of miles removed from his home, his friends, his counsel, his local board and the witnesses who can testify in his behalf. Should he overcome all these obstacles and possess enough money to proceed further, he still faces the possibility of being shifted by the military at a moment's notice into another jurisdiction, thus making the proceeding moot. There is little assurance, moreover, that the military will treat his efforts to obtain the writ with sympathetic understanding. These practical difficulties may thus destroy whatever efficacy the remedy might otherwise have and cast considerable doubt on the assumption that habeas corpus proceedings necessarily guarantee due process of law to inductees.

But the availability of judicial review through habeas corpus proceedings misses the issue in this case. Such a proceeding may or may not provide an adequate remedy for the person who has been inducted. We are dealing here, however, with two persons who have not been inducted and who never will be inducted by force of the orders under attack. The writ of habeas corpus following induction is thus a completely non-existent remedy so far as these petitioners are concerned. It neither adds to nor detracts from the reasons for granting judicial review in these criminal proceedings.

If, as I believe, judicial review of some sort and at some time is required by the Constitution, then when and where can these petitioners secure that review? They have not had a prior chance to obtain review of the induction orders; nor will they subsequently be accorded the opportunity to test their contentions in court. It is no answer

that they should have pursued different courses of action and secured writs of habeas corpus after induction. Due process of law is not dispensed on the basis of what people might have or should have done. The sole issue here is whether due process of law is to be granted now or never. The choice seems obvious.

By denying judicial review in this criminal proceeding, the courts below in effect said to each petitioner: You have disobeyed an allegedly illegal order for which you must be punished without the benefit of the judicial review required by the Constitution, although if you had obeyed the order you would have had all the judicial review necessary. I am at a loss to appreciate the logic or justice of that position. It denies due process of law to one who is charged with a crime and grants it to one who is obedient. It closes the door of the Constitution to a person whose liberty is at stake and whose need for due process of law is most acute. In short, it condemns a man without a fair hearing.

There is something basically wrong and unjust about a juridical system that sanctions the imprisonment of a man without ever according him the opportunity to claim that the charge made against him is illegal. I am not yet willing to conclude that we have such a system in this nation. Every fiber of the Constitution and every legal principle of justice and fairness indicate otherwise. The reports are filled with decisions affirming the right to a fair and full hearing, the opportunity to present every possible defense to a criminal charge and the chance at some point to challenge an administrative order before punishment. Those rudimentary concepts are ingrained in our legal framework and stand ready for use whenever life or liberty is in peril. The need for their application in this instance seems beyond dispute.

We must be cognizant of the fact that we are dealing here with a legislative measure born of the cataclysm of war, which necessitates many temporary restrictions on personal liberty and freedom. But the war power is not a blank check to be used in blind disregard of all the individual rights which we have struggled so long to recognize and preserve. It must be used with discretion and with a sense of proportionate values. In this instance it seems highly improbable that the war effort necessitates the destruction of the right of a person charged with a crime to obtain a complete review and consideration of his defense. As long as courts are open and functioning, judicial review is not expendable.

All of the mobilization and all of the war effort will have been in vain if, when all is finished, we discover that in the process we have destroyed the very freedoms for which we fought. These cases represent a small but significant reflection of that fact. The reversal of the judgments below is therefore in line with the highest traditions of the Court.

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ALONZO COLLINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
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Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-409

ALFORD COLLINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of West Virginia, petitioner was convicted of willfully refusing to submit to induction into the armed forces, in violation of 50 U.S.C. App. 462(a). He was sentenced to three years' imprisonment. The court of appeals affirmed *per curiam* (Pet. App. 7-8), and denied a petition for rehearing (Pet. App. 9).

The facts are not in dispute. Petitioner was classified I-A on January 15, 1967, and, on May 12, 1967, he was mailed an order to report for induction on May 23, 1967.

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On the date he was scheduled for induction, petitioner for the first time filed with his local board an SSS Form 150 (Special Form for Conscientious Objectors), claiming an opposition to participation in war in any form. He then reported, as ordered, for induction but, when his name was called, he refused to take the symbolic step forward. Thereafter, petitioner's local board refused to reopen his classification; the present indictment and conviction followed, and the court of appeals, relying on the decision by this Court in *Ehlert* v. *United States,* 402 U.S. 99, affirmed *per curiam* (Pet. App. 7–8).

In *Ehlert,* this Court held that consideration of post-induction-notice conscientious objector claims is not to be undertaken by the Selective Service System; rather the appropriate forum for review of such claims is within the military after the registrant has submitted to induction. Petitioner seeks here, as he did below, to except himself from that ruling on the ground that his views had crystallized to the point where he could not in conscience submit to induction even for the limited purpose of obtaining an administrative review of his claim.

But, that same contention was made in *Ehlert* (see Pet. Reply Br., No. 120, October Term, 1970, p. 23); in response, this Court pointed out (402 U.S. at 102–103; footnotes omitted):

> The only unconditional right conferred by statute upon conscientious objectors is exemption from *combatant* training and service. * * * It does not follow, given the power to make reasonable timeliness rules, that a registrant

> has an unconditional right to present his claim to the local board before induction, any more than he has such a right after induction. Congress seems rather carefully to have confined the unconditional right created by the statute to immunity from combatant training and service. Consequently, requiring those whose conscientious objection has not crystallized until after their induction notices to present their claims after induction would work no deprivation of statutory rights, so long as the claimants were not subjected to combatant training or service until their claims had been acted upon. [Emphasis in original.]

Petitioner has an available forum within the military for review of his post-induction-notice conscientious objector claim without being subjected to any combatant training and service (see Army Regulation AR 635–20, para. 6a (July 31, 1970)). Requiring him to submit to induction in order to invoke the military review process does not conflict with any constitutional [1] or statutory rights he might have. The fact that he may choose not to pursue this course, whatever his reasons, does not legally make the military forum any less available to him than it was to Ehlert.[2]

---

[1] Exemption from combatant training and service is a matter of legislative grace; not constitutional right. See *United States* v. *MacIntosh*, 283 U.S. 605, 623–624; *Hamilton* v. *Regents*, 293 U.S. 245, 264; *In re Sommers*, 325 U.S. 561; *Welsh* v. *United States*, 398 U.S. 333.

[2] If the mere assertion by a registrant that he cannot in conscience submit to induction were sufficient ground for taking this case out of the *Ehlert* rule, the principle enunciated in *Ehlert* as to post-notice conscientious objector claims would, as a practical matter, have little or no application.

Indeed, in such circumstances, he stands on essentially the same footing as the individual who refuses even to register with his local draft board on the ground that his opposition to all wars is so strong that he cannot in conscience cooperate in any way with the Selective Service System.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1971.

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PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

The Government argues that Ehlert answers the question raised in the Petition when it stated that Congress only granted an unconditional right to exemption from combatant service.

First, your petitioner is claiming a violation of a constitutional right—the constitutional right of being entitled to "equal protection of the law"—a contention that the Government wholly fails to comment upon.

Secondly, Ehlert doesn't serve to answer the question raised by petitioner, but to the contrary, serves to amplify the constitutional violation existing in the statute if the Ehlert decision stands unmodified.

Said constitutional violation would follow from the construction of the statute which would permit consideration of a conscientious objector's claim whose religious convictions would allow him to enter into the military service, but would deny consideration to a conscientious objector's claim whose religious convictions forbade him to enter the military service.

Both of such conscientious objectors claim the same I-O classification, but only one is being granted, and the other denied a forum, for consideration of his post-induction order classification.

As a consequence, unless the Court excepts Petitioner's class of conscientious objectors from the Ehlert rule, then Petitioner contends that the statute as construed now violates the equal protection of the laws clause and is void.

Respectfully submitted,

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